RE BAHANUDIN HJ MOKHTAR, EX P RHB BANK AND OTHER APPEALS

HIGH COURT MALAYA, KOTA BHARU
ARIFIN ZAKARIA J
[BANKRUPTCY NOS: 29-124-97, 29-125-97 & 29-126-97]
6 DECEMBER 1999

BANKRUPTCY: *Creditor's petition - Service - Whether judgment debtor must be served with sealed copy of petition - Whether sealed copy of petition annexed to affidavit - Whether service bad - Whether judgment debtor misled or prejudiced - Whether merely formal defects - Whether curable - Bankruptcy Rules 1969, rr. 109, 111(2), 131*

BANKRUPTCY: *Adjournment - Discretion of court - Judgment debtor applied for adjournment - Judgment creditor agreed to adjournment - Whether judgment creditor estopped from applying for receiving and adjudicating orders*

The judgment debtor filed an application under s. 105 Bankruptcy Act 1967 for the annulment of the receiving order ('RO') and the adjudication order ('AO') entered against him. The grounds in support of the application were, *inter alia*, that the judgment creditor was estopped from applying for the RO and AO as the judgment creditor had on a previous occasion agreed to the bankruptcy proceedings being adjourned pending the disposal of a civil suit; non-compliance by the judgment creditor with r. 109 and r. 111(2) Bankruptcy Rules 1969; and the officer affirming the affidavit of truth of statements in the creditor's petition had no authority to affirm the affidavit on behalf of the petitioner. The judgment debtor's application was dismissed by the senior assistant registrar and the judgment debtor appealed.

Held:

[1] The adjournment of a hearing is a matter in the absolute discretion of the court. A party to a proceeding may agree or disagree to an adjournment request made by the opposite party but that is merely one of the several factors taken into consideration by the court in deciding whether to grant an adjournment.

[2] A party is at liberty to change his stand on the issue of adjournment as and when the application is made.

[3] The judgment debtor had not in any way been misled by the service of the unsealed copy of the creditor's petition or prejudiced by the failure of the judgment creditor to comply with r. 111(2) Bankruptcy Rules 1969. Thus the defects were curable under s. 131 Bankruptcy Act 1967.

[4] The challenge made by the judgment debtor on the authority of the officer was made too late in the day.

[Appeal dismissed.]

Case(s) referred to:

Au Yong v. Dicum & Anor [1963] MLJ 349 ***(refd)***

Go Pak Hoong Tractor and Building Construction v. Sykt Pasir Perdana [1982] 1 MLJ 77 ***(refd)***

Kamaruddin Mohamed v. United Motor & Works (M) Sdn Bhd [1982] 1 MLJ 126 ***(refd)***

Re Hj Yahya Lampang, ex p Sabah Development Bank Bhd [1987] 2 MLJ 488 ***(foll)***

Re MPLM Muthiah Chettiar, ex p SPN Ramanathan Chettiar [1938] MLJ 223 ***(dist)***

Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd [1992] 3 CLJ 1747 ***(refd)***

Re Samuel Pakianathan Jabamanickam, ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 105, 131

Bankruptcy Rules 1969, rr. 109, 111(2), 117, 274

For the appellant/judgment debtor - Azmat Azlin Ahmad; M/s Zaidan & Co

For the respondent/judgment creditor - Wan Azman Wan Ahmad; M/s Lua & Mansor

Reported by Izzaty Izzuddin

JUDGMENT

Arifin Zakaria J:

The three appeals against the decision of the learned SAR were heard together as similar factual and legal issues were canvassed by the parties. For convenience it was agreed that Bankruptcy No: 29-124-1997 be taken as a test case and the decision therein will be binding on the other two cases. The relevant encl in the said case is encl. 16. It is an application by the judgment debtor (JD) under s. 105 of the Bankruptcy Act 1967 (the Act) for annulment of adjudication order. The grounds in support of this application appear in the affidavit of the JD contained in the same encl. I shall consider these grounds in the order it was taken up by the learned counsel for the JD before me.

Firstly the learned counsel for the JD stated that in respect of Bankruptcy No. 29-124-97 and Bankruptcy No. 29-125-97, on 6 January 1999 when these two cases came up for hearing the learned counsel for the judgment creditor (JC) mentioned these cases on behalf of counsel for the JD seeking adjournment of the hearing pending the disposal of the Civil Suit No. 22-72-97. A copy of the writ of summons and statement of claim of the said suit is tendered as exh. "BHM3". In the said suit the JD is seeking for a declaration that the order obtained against the JD in OS No. 24-184-1996 dated 5 January 1997 is invalid and be set aside. Counsel for the JD further stated that when the bankruptcy proceedings again came up for hearing on 3 June 1998 she applied for adjournment of the proceedings on the same ground and her application was granted by the learned SAR. However, on 7 April 1999 when the proceedings came up for hearing for the third time her request for adjournment was objected to by counsel for the JC and the SAR accordingly rejected her application and the RO and AO were issued by the court.

On the premise that the learned counsel for the JC had on previous occasions agreed to the JD's request for the adjournment of the proceedings she contended that the JC is now estopped from applying for the RO & AO against the JD until C.S. No. 29-124-97 is disposed of by the court. With respect I am unable to agree with her argument for the following reasons. Firstly the adjournment of hearing is a matter in the absolute discretion of the court depending on the facts and circumstances of each case. (See *Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 77). The party in a particular case may agree or otherwise to an application for an adjournment made by the opposite party but that is merely one of the several factors taken into consideration by the court in deciding whether to grant or not to grant such an application. Therefore, I am of the view that, the fact that a party objected to the application for adjournment could not be a ground to support an application to set aside the order that was made by the court following its refusal to adjourn the hearing. Further I hold that a party is at liberty to change his stand on the question of adjournment as and when the application is made. In the circumstances, I find that the doctrine of estoppel by conduct relied upon by counsel for the JD has no application in this regard. For the above reasons I rejected the first ground put forward by the JD.

The 2nd ground put forward by the JD is that the creditor's petition (CP) which was served on the JD was not proper in that it failed to comply with r. 109 of the Bankruptcy Rules 1969 (the Rules). Counsel for the JD submitted that under r. 109 a sealed copy of the petition need to be served

on the JD. In the present case it is not disputed that the CP served on the JD was not a sealed copy. (See exh. BM1 to the JD's affidavit in support of this application.) The third ground was that the affidavit of service does not comply with r. 111(2) of the Rules in that a sealed copy of the petition was not annexed to the affidavit as required by the said rule. Learned counsel for the JD contended these were not just formal defects which could be cured by s. 131 of the Bankruptcy Act 1967 ("the Act") or r. 274 of the Rules. She cited the case of *Re M.P.L.M. Muthiah Chettiar Ex parte S.P.N. Ramanathan Chettiar* [1938] MLJ 223 where it was held that the copy of a bankruptcy notice for service upon the debtor must be sealed with the seal of the Supreme Court. If it is not sealed with the seal of the Supreme Court the omission is not a mere formal defect, but it renders the service upon the debtor a nullity and being a material defect the court has no power to waive it. If I may add the decision in *Re Peh Kong Wan ex p United Malayan Banking Corp. Bhd.* [1992] 3 CLJ 1747; [1992] 2 MLJ 292 also goes the same way.

On the second ground, I think, the correct approach is as stated by Abu Mansor, J (as he then was) in *Re Haji Yahya Lampang ex p Sabah Development Bank Bhd.* [1987] 2 MLJ 488 at p. 490 where he said:

> What had to be determined by this court was whether the unsealed creditors' petition HLY-1, enclosure (4), could mislead the judgment debtor. After considering *Re Au Yong (supra)*, and the case of *Rengasamy v. Comptroller of Income Tax (supra)* and their combined effect I hold that this unsealed creditors' petition, HLY-1, could not reasonably mislead the judgment debtor and therefore it was validated by section 131 of the Bankruptcy Act. I do so after examining the details of what is stated in HLY-1. It was clear as to who presented the petition, the amount of the debt, the judgment of which court and how the debt arose and it did specify the particular act of bankruptcy the petition referred to. These facts were further enforced by the fact that the bankruptcy notice was personally served on the judgment debtor by the clerk of the judgment creditors' solicitors according to enclosure (7). The judgment debtor was represented by a solicitor and he, being a man of considerable standing, a Member of Parliament and a Member of the Sabah Legislative Assembly, as was said in *Re Au Yong (supra)*, could easily set in motion an enquiry as to what the petition HLY-1 was about if he was in any doubt. I will refer later on that by conduct the judgment debtor accepted the judgment and the bankruptcy notice and was in no way misled.

In *Re Samuel Pakianathan a/l Jabamanickam, ex p Perwira Habib Bank (M) Bhd.* [1997] 5 MLJ 737 the question of whether the service of bankruptcy notice and creditor's petition ought to be by way of a sealed copy or whether a true copy would suffice came up for consideration of

the court. After considering *Re M.P.L.M. Muthiah Chettiar, ex p S.P.N. Ramanathan Chettiar (supra), Au Yong v. Dicum & Anor* [1963] MLJ 349 and the Federal Court decision in *Kamaruddin bin Mohamed v. United Motor & Works (M) Sdn. Bhd.* [1982] 1 MLJ 126 the learned JC at p. 754 stated:

> Since the object of bankruptcy notice was to bring to the attention of the appellant that the bankruptcy notice had indeed been issued against him. I am bound by the dictum of the Federal Court in *Kamaruddin bin Mohamed* to hold that notwithstanding the fact that a true copy and not a sealed copy was served on the appellant such service though strictly not in compliance with the Rules, did not render the service bad and hold that there had been effective service of the bankruptcy notice.

Applying the above mentioned approach to the present case clearly one could not seriously say that the JD herein in any way been misled by the service of the unsealed copy of creditor's petition. In fact the JD in his affidavit in support of this application did not say so. In the circumstances I hold that the defect in the petition is thus curable under s. 131 of the Act.

With regard to the third ground I think the same principle would apply since the JD could not be said to have been in any way misled or prejudice by the failure of the JC to comply with r. 111(2) of the Rules. Therefore, this defect is likewise curable under s. 131 of the Act. I am supported in this by Kamalanathan Ratnam JC (as he then was) in *Re Samuel Pakianathan (supra).*

The fourth ground advanced by the JD was that the officer who deposed to the affidavit of truth of statements in the petition had no authority to affirm the said affidavit on behalf of the petitioner. (A copy of the said affidavit is found in exh. BHM I of the JD's affidavit.) Counsel for the JC contended that the JD could have raised this issue by filing a notice to show cause against the petition under r. 117 of the Rules but the JD instead chose to do nothing at that stage. It is only now, after the RO and AO had been made, the JD sought to challenge the authority of the said officer. He submitted this is too late in the day. Furthermore, the JD had not appealed against the decision of the SAR. Counsel for the JC contended that in the circumstances this application by the JD smacks of an abuse of the process of the court. I wholly agree with the submissions of counsel for the JC.

For the above reasons I dismissed the JD's application herein with cost.